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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 643

WALTER A. HUNTER, WARDEN, UNITED STATES PENITENTIARY, LEAVENWORTH, KANSAS, PETITIONER

v.

FRED CLIFFORD MARTIN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The circuit court of appeals, without opinion, reversed the judgment of the district court and ordered respondent discharged from petitioner's custody on the authority of *Johnston* v. *Wright*, 137 F. 2d 914 (C. C. A. 9) (R. 43). The order discharging the writ of habeas corpus, findings of fact and conclusions of law of the district court appear at R. 16–19.

JURISDICTION

The judgment of the circuit court of appeals was entered January 13, 1948 (R. 43), and a petition for rehearing (R. 43–48) was denied February 12, 1948 (R. 48). The petition for a writ of certiorari was filed on March 4, 1948, and on March 15, 1948, the petition was granted and the case transferred to the summary docket (R. 11).

QUESTION PRESENTED

While confined in the Missouri State Penitentiary, respondent was sentenced by a federal district court to imprisonment for 10 years. The judgment provided that the sentence should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary." Respondent was thereafter paroled from the state prison and surrendered by the state authorities to federal custody for the purpose of serving his federal sentence. The question is whether, even though respondent was turned over by the state authorities to the Federal Government for execution of his federal sentence, that sentence should be interpreted as meaning that it cannot begin to run until respondent's state parole period expires.

STATEMENT

On September 27, 1945, respondent pleaded guilty in a Missouri state court to a charge of automobile theft and was sentenced to imprison-

ment for three years. He commenced service of this sentence in the Missouri State Penitentiary on the following day (R. 25–26, 27).

On March 28, 1947, respondent was indicted in the United States District Court for the Western District of Missouri in four counts charging the forging and uttering of United States Treasury checks, in violation of Section 29 of the Criminal Code (18 U. S. C. 73) (R. 7–9). He pleaded guilty to these charges, and on April 10, 1947, he was sentenced to imprisonment for ten years on each count, the sentences to run concurrently (R. 9–11). The judgment provided that the sentence on count 1, and consequently on all four counts, should "begin to run at the expiration of the sentence now being served in the Missouri State Penitentiary" (R. 10, 11). Respondent was promptly returned to the state penitentiary to resume service of the state sentence (R. 30).[1] The expiration date of the maximum term of that sentence is August 26, 1948 (R. 26; see R. 23).[2]

Effective May 13, 1947, respondent was granted a parole to run to August 26, 1948, unless sooner

[1] A detainer based on the federal charges was apparently lodged with the state prison (R. 30).

[2] It does not appear from the record why this date is August 26, 1948, rather than three years from September 28, 1945, when respondent commenced service of the sentence. The apparent discrepancy of approximately one month may possibly be due to his having been given credit on the sentence for time spent in custody prior to his plea and sentence. Whatever the explanation, the discrepancy is without relevance in this case.

revoked, signed by the members of the Missouri Board of Probation and Parole (R. 25–26, 31). On that date he was delivered, for the purpose of serving his federal sentence, to the custody of the United States Marshal in the office of the deputy warden of the penitentiary (R. 31–32) and in the presence of the secretary of the Missouri Board of Probation and Parole (R. 32–33). Respondent was taken to the Cole County Jail in Jefferson City, Missouri, for a few days (R. 31), but since May 20, 1947 (R. 12–13), he has been confined under the federal sentence at the United States Penitentiary at Leavenworth, Kansas.

On August 20, 1947, respondent filed a petition for a writ of habeas corpus in the United States District Court for the District of Kansas in which he claimed that petitioner had no authority to hold him in custody under the federal sentence because that sentence directed that its execution was to commence on August 26, 1948 (R. 2–3). Petitioner filed a return (R. 5–7) in which it was contended that the federal sentence properly began to run as of May 13, 1947, when respondent was released from the state penitentiary and delivered into federal custody. The writ issued (R. 15), and, after a hearing (R. 21–41), the court ordered it discharged and remanded respondent to petitioner's custody (R. 16–19). The court preferred to rely on the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States*

ex rel. Lombardo v. *McDonnell*, 153 F. 2d 919, 920–921, rather than on the contrary Ninth Circuit decision in *Johnston* v. *Wright*, 137 F. 2d 914 (R. 19). On respondent's appeal to the Circuit Court of Appeals for the Tenth Circuit, that court, without opinion, reversed the judgment of the district court and remanded the case with directions to discharge respondent from petitioner's custody on the authority of the Ninth Circuit's decision in *Johnston* v. *Wright*, *supra* (R. 43).[1]

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

(1) In reversing the judgment of the district court.

(2) In holding that the judgment of conviction requires that respondent shall not be committed to serve the federal sentence until his state parole period expires.

SUMMARY OF ARGUMENT

A. Controlling weight should be given to the federal sentencing judge's intent if that is revealed with fair certainty. *United States* v. *Daugherty*, 269 U. S. 360, 363. In sentences of the type involved in this and the *Wright* case, relied upon by the court below, it is evident that the sentencing judge has two objectives in mind:

[1] Enforcement of the judgment and mandate of the circuit court of appeals was stayed by this Court on March 8, 1948, pending the final disposition of the case.

He does not want the sentence to run concurrently with the state sentence, and, in the spirit of comity, he is directing that his sentence is not to become operative until it becomes apparent that the state sentence no longer constitutes an obstacle to the enforcement of the federal sentence or, at least, is regarded by the state authorities as no longer being such an obstacle. When, as here, the responsible state officials have paroled the prisoner and surrendered him to the Federal Government for service of his federal sentence, the state sentence has, in a very realistic sense, come to an end or "expired" in that it is no longer an impediment to the enforcement of the federal judgment. It was at that point, we think it clear, that the sentencing judge intended the federal sentence to become operative. Any further postponement could have no practical relationship to the problem of enforcing the federal judgment.

To tie the beginning of respondent's federal sentence to the expiration of his state parole period would produce results which certainly no federal sentencing judge could seriously have contemplated. It is unreasonable to assume that he would have so disregarded the interests of society, as well as of the defendant himself, as to permit a prisoner with a concededly valid 10-year federal sentence to remain at large before commencing to serve it. The obvious temptation of flight to avoid reincarceration and the manifest

desirability of a defendant's serving his sentences without interruption, so that when finally released he may effect his rehabilitation without being faced with the prospect of reincarceration, are among the factors which make against any such assumption.

The decision of the district court that respondent's federal sentence commenced when he was surrendered by the state authorities and taken into federal custody for service of the federal sentence is supported by the decision of the Seventh Circuit in *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919, 920–921, as well as the practice reflected by a number of cases involving analogous state and federal consecutive sentences of assuming custody under the later sentence prior to the technical expiration of the earlier sentence without objection by the authorities of the other sovereignty, a practice indicative of the artificiality of the Ninth and Tenth Circuits' view.

B. The Ninth Circuit's decision in *Johnston* v. *Wright* was influenced to a large extent by its analysis of the Illinois parole law and the resulting conclusion that the Illinois parole agency was without authority to parole a prisoner for the purpose of subjecting him to the service of a sentence obtained in another jurisdiction. We think that under the Missouri law the Missouri parole board had the power held to be missing in the *Wright*

case but, we submit, the question of the board's power is without relevance. The question here is, simply, whether the sentencing judge intended respondent's federal sentence to become effective when it became evident, as it did, that the state sentence was regarded by the local authorities as no longer an obstacle to the enforcement of the federal judgment. The question is not whether the Missouri parole authorities properly administered state law in surrendering respondent to the custody of the Federal Government for service of his sentence. This, clearly, is a problem purely of state concern. Obviously, also, respondent is not in a position to say that comity demands that he be allowed to remain at large in Missouri until his parole period expires and thus postpone the execution of his federal sentence. The authorities cited at pages 21–27, *infra*, including also, we think, the later Ninth Circuit decision in *Kirk* v. *Squier*, 150 F. 2d 3, clearly support these propositions.

ARGUMENT

Properly construed, respondent's federal sentence became effective when he was released from the state prison on parole and surrendered to the federal authorities to serve the federal sentence

It is clear from respondent's own testimony at the habeas corpus hearing that the Missouri Board of Probation and Parole released him on parole on May 13, 1947, for the express purpose of surrendering him to the Federal Government

for the service of his 10-year federal sentence. This sentence, under normal circumstances, would obviously run far beyond the expiration of the maximum term of his state sentence on August 26, 1948, and, hence, beyond his state parole period (R. 25–26). The state reserved control over respondent as a parolee only in the event that he was not kept in incarceration at the Leavenworth Federal Penitentiary during the state parole period.[4]

In this context, the question presented is whether respondent's state sentence had, within the meaning of the federal sentence, "expired"

[4] The order of parole signed by the members of the Missouri Board of Probation and Parole (R. 25–26), which was handed to respondent at the time of his release from the state prison (R. 31), provided (R. 26) that respondent "is hereby released on Parole, which may be revoked without notice, by the Board of Probation and Parole," and "That the above-mentioned recipient shall remain in the legal custody of the Missouri State Penitentiary, but shall be amenable to the orders of the Board of Probation and Parole until the expiration of the maximum term, or until returned to the Missouri State Penitentiary by order of the Board of Probation and Parole." However, respondent at the habeas corpus hearing testified that he was told by the secretary of the Board a week before May 13, 1947, that he would be released on parole on that date (R. 30), that the United States Marshal at Kansas City, Missouri, would be informed of the release (R. 31), and that, when he was surrendered to the custody of the United States Marshal, the secretary of the Parole Board notified him "that he was also sending along * * * parole papers for me to send in in the event I wasn't kept in incarceration at the Federal Penitentiary at Leavenworth, Kansas." (R. 32.) The secretary of the Board is its "chief administrative and executive officer" (*infra*, p. 25).

at the time he was surrendered to the Federal Government, so that the federal sentence could then become operative.

In ordering respondent's discharge from federal custody and in reversing the decision of the district court, the Circuit Court of Appeals for the Tenth Circuit relied, without discussion, on the Ninth Circut decision in *Johnston* v. *Wright*, 137 F. 2d 914. In that case Wright was serving a one-year to life sentence in an Illinois state penitentiary. While serving that sentence he was sentenced in the Illinois federal district court on two indictments, the first sentence, covering 10 years, providing that it should begin at the expiration of the sentence Wright was then serving in the Illinois state penitentiary. Wright was returned to the Illinois state penitentiary but was later released on parole by the state authorities and surrendered to the Federal Government for service of his sentence. Wright was to be returned to Illinois as a parolee if and when he was released from federal restraint.

In ordering Wright released from federal custody, the Ninth Circuit, as we read its decision, held that the federal sentence had not begun to run because under its language its commencement was conditioned not upon Wright's release from the state prison but upon the technical expiration of the state sentence, which evidently could not occur until Wright was discharged from

parole control. It also held that under Illinois law the Illinois parole agency was without power to release a prisoner from a state prison nominally on parole but actually for the purpose of transferring him to the federal authorities for further imprisonment in a federal institution.[5]

In the later Ninth Circuit case of *Kirk* v. *Squier*, 150 F. 2d 3, certiorari denied, 326 U. S. 775, the facts were that at the time the federal sentence was pronounced Kirk was serving in a California state prison a sentence for life, "with possibility of parole." Eight years later he was released from the state prison and paroled into the custody of the federal authorities for the purpose of serving his federal sentence. The Ninth Circuit, distinguishing its prior decision in the *Wright* case, reached the conclusion that the federal sentence was in effect because, unlike the sentence in the *Wright* case, it provided that it should commence to run upon the "release" of Kirk "from the imprisonment" he was serving under the California sentence, and because the court found that under state law the California parole board had power to fix as a condition of parole that the parolee serve the federal sentence, a power which it had decided in the *Wright* case the Illinois paroling agency did not have. But the court also held that the fact that Kirk

[5] See also the decision of Circuit Judge Denman, on habeas corpus, affirmed on appeal by the Circuit Court of Appeals for the Ninth Circuit (51 F. Supp. 639 (N. D. Cal.)).

still retained the technical status of a state parolee was of no consequence because neither Kirk nor the Federal Government had a legal right to interfere with California's administration of its own parole laws, because Kirk could not by habeas corpus invoke the doctrine of comity to resist the exercise of state authority, and because the federal sentence contemplated a release from actual imprisonment, and not the "ambulatory" imprisonment of a parolee.

Considering these two decisions together, it would appear to be the view of the Ninth Circuit that the fact that a defendant incarcerated under a federal sentence is technically a state parolee is without significance, provided that the state parole agency has authority to utilize the parole procedure to surrender him to the Federal Government for service of that Government's sentence, and provided further that the federal sentence uses the formula that it is to begin to run when the defendant is "released from imprisonment" under the state sentence rather than that it is to commence upon the "expiration" of the state sentence.

The twofold vice in these decisions, it seems to us, is that they attribute a difference in purpose to diversities of language in federal sentences which were, in reality, intended to accomplish the identical result, and that they indulge in an appraisal of state parole power which was with-

out relevance in the interpretation of the federal sentences involved.

In determining the meaning of a federal sentence, there is no rule of strict construction comparable to the principle applicable in the interpretation of a penal statute. It is sufficient that sentences in federal criminal cases "reveal with fair certainty the intent of the court and exclude any serious misapprehensions by those who must execute them. The elimination of every possible doubt cannot be demanded." *United States* v. *Daugherty*, 269 U. S. 360, 363. Judged by this criterion, the question then is: Did the sentencing judge intend that his sentence should begin to run when respondent was released from imprisonment under his state sentence and that sentence was regarded by the state authorities as no longer an obstacle to the enforcement of the federal judgment, or did he intend that, notwithstanding the state's consent to the earlier service of the federal sentence, it should not commence prior to the expiration date of the maximum term of respondent's state sentence, even though the later portion of that sentence was to be served only on parole?

A. *The objectives of the sentencing judge in directing that the federal sentence should commence upon the "expiration" of the Missouri state sentence respondent was then serving.*—The Ninth Circuit construes a federal sentence of the type

involved in this and the *Wright* case as though it stated precisely that it is to begin on the date when the defendant's maximum state term expires, or, the equivalent date, when his parole period ends.[6] But the sentence does not say that. Actually, it uses the less precise language that it is to commence upon the "expiration" of the state sentence then being served. Viewing the language in the light of the objectives which the sentencing judge must undoubtedly have had in mind when he used it, it seems to us that he intended to accomplish exactly the same thing as did the federal judge in the *Kirk* case who made his sentence commence when Kirk was "released from imprisonment" under the prior state sentence. Each judge was saying that he did not want his sentence to be served concurrently with the state sentence but to constitute additional punishment.[7] At the same time, he was articulating a principle of com-

[6] This date would presumably, as here, ordinarily coincide with the expiration date of the defendant's maximum state term, but see the reference in the decision of Judge Denman in *In re Wright*, *supra* (51 F. Supp. at 643) to provisions of the Illinois parole law which give the state parole agency, with the approval of the Governor, the power to free a parolee earlier from the conditions of his parole and to terminate his sentence.

[7] Despite the provisions of 18 U. S. C., Supp. V, 753f that "All persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of

ity which had long obtained between the national and state governments. He was recognizing that the state sentence had priority because state custody first attached, and he was, therefore, in ef-

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all such persons shall be served," there have been various instances where federal district judges have directed that their sentences run concurrently with existing state sentences without objection by this Department. In fact, the record shows that during the course of the service of respondent's state sentence he was given a concurrent federal sentence of three months for theft of the same automobile for which he was sentenced by the state (R. 27–28). The prisoner in such cases would, of course, have no reason to complain because his federal sentence was concurrent.

Where, however, the federal sentence is silent as to whether it is to be served concurrently or consecutively with an existing state sentence, there are several decisions which hold that the federal sentence begins to run only when, after completion of the state sentence, the defendant is incarcerated under the federal sentence. *Zerbst* v. *McPike*, 97 F. 2d 253 (C. C. A. 5); *Ex parte Aubert*, 51 F. 2d 136 (N. D. Cal.); *Ex parte McCullen*, 29 F. 2d 852 (W. D. Wash.); see also *United States* v. *Marrin*, 227 Fed. 314 (E. D. Pa.). The rationale of these decisions appears to be that, contrary to the usual rule obtaining as to federal sentences where the second sentence is silent as to the date of commencement, the federal sentence should not be considered as running concurrently with the state sentence because, under the principle of comity, the state should be permitted full custody of the prisoner until his imprisonment under the state sentence is terminated. The *McPike* decision also pointed to the provisions of 18 U. S. C. 709a (see footnote 8, *infra*, pp. 17–18) that a federal sentence should not begin to run until the prisoner is incarcerated under the federal sentence. None of these cases involved any attempt, as here, to prevent the execution of the federal sentence until the expiration of a state parole period.

fect directing that the federal sentence was to become operative only when it became apparent that the state sentence no longer constituted an obstacle to the enforcement of the federal sentence, or, at least, was regarded by the state as no longer being such an obstacle.

This might occur in various ways; For example, the prisoner might serve the full term of his state sentence; he might serve a shorter period because of good time credits; he might be pardoned; his state sentence might be commuted, perhaps for the very purpose of surrendering him for service of the federal sentence; or, as in the *Kirk* and *Wright* cases, and here, the state might release the prisoner through its parole procedure and surrender him to the federal authorities for service of the federal sentence. But when any of these things occurred, whether by operation of state law or the action of responsible state officials, there was no good reason for any further postponement of the execution of the federal judgment. The impediment presented by the state sentence to the enforcement of the federal sentence had been removed. So far as execution of the federal sentence was concerned, the state sentence had, in a very realistic sense, come to an end, "whether it expired by completion of the full term or by earlier termination in any other manner." *Wall* v. *Hudspeth,* 108 F. 2d 865, 867 (C. C. A. 10): The prisoner had been "released from im-

prisonment" under the state sentence, and the state sentence had also "expired" in that it was no longer an obstacle to the enforcement of the federal judgment. The federal judge could have no reason to postpone the commencement of a criminal sentence beyond this date. Any further postponement could have no practical relationship to the enforcement of the federal judgment. In framing his sentence the federal judge was certainly not concerned with the administration of the state parole law, if he gave any thought to that matter. What he was interested in, clearly, was the avoidance of any conflict between the execution of the state and federal sentences, an objective which his language sufficiently accomplished. That objective could have been achieved no better if he had provided that respondent's sentence should begin upon his "release from imprisonment" under the state sentence, for even in that situation there would have had to be some indication, in the event of parole, that the state acquiesced in the assumption of federal custody before such custody would have been appropriate. Cf. *Rosenthal* v. *Hunter*, 164 F. 2d 949, 950 (C. C. A. 10).[8]

[8] Under 18 U. S. C. 709a the federal sentence would begin as soon as the prisoner was incarcerated under it. That section provides that "The sentence of imprisonment of any person convicted of a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: *Provided*, That if any such person shall

A construction which would gear the commencement of the federal sentence in this case to the expiration of respondent's state parole period would produce results which certainly no federal judge could seriously have contemplated. It would require the unreasonable assumption that the sentencing judge desired that respondent should enjoy the bounty of an interlude of liberty before beginning the service of his federal sentence. Plainly, the interests of society would have been poorly served by permitting a prisoner with a concededly valid 10-year sentence (see R. 2, 23, 38, 40) to remain at large. There is the obvious temptation of flight in such a situation to avoid reincarceration. And, from the standpoint of the defendant, it is difficult to believe that a sentencing judge, for the sake of giving him a temporary break in imprisonment, would ignore the long-range advantage to a prisoner of serving his sentences without interruption, so that when finally released he might effect his rehabilitation

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be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

Under the *McPike* and other decisions referred to in the preceding footnote, it is obvious that by reason of 18 U. S. C. 709a the same result as is here urged would follow if the federal sentence involved in this case had been silent as to the date it was to begin. See also *Rohr* v. *Hudspeth*, 105 F. 2d 747 (C. C. A. 10).

without being faced with the prospect of reincarceration at a later date.

Significantly, the federal parole system was established on the precise basis that there should be no break in imprisonment for parole purposes where the defendant is incarcerated under consecutive federal sentences. It accomplishes this by aggregating the consecutive sentences and treating them as a single sentence for the purpose of determining the parole eligibility date. Thus, 18 U. S. C. 714 provides that "Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined * * * in any United States penitentiary or prison, for a definite term *or terms* of over one year, * * * whose record of conduct shows that he has observed the rules of such institution, and who * * * has served one-third of the total of such term *or terms* * * * may be released on parole * * *." [Italics supplied]. Congress has thus declared that a workable parole system, designed to protect the interests of society and of the defendant himself, does not countenance the piecemeal serving of consecutive federal sentences, interrupted by intervals at liberty on parole.[9] It is hardly likely

[9] Similarly, the statute fixing the deductions from sentences for good conduct (18 U. S. C. 710) does not contemplate that a prisoner serving consecutive sentences is entitled to periodic interludes of liberty in which to enjoy his good-time deductions before returning to prison to commence service of the

that a federal sentencing judge, presumably familiar with this system, would designedly so frame a federal sentence made to run consecutively to a state sentence as to grant the defendant an interlude at large on parole before beginning his federal sentence.

Additionally, in any case where a federal sentence contains language such as that used in the sentence in this case and the state prisoner is on parole for a long period of time or for life, the result might be that the federal sentence may never be served if the Ninth Circuit's view, now adopted by the Tenth Circuit, were upheld. It is unreasonable to suppose that any such impediment to the successful administration of the federal criminal laws could have been intended by the language employed in the federal sentence.

In *United States ex rel. Lombardo* v. *McDonnell*, 153 F. 2d 919, 920–921 (C. C. A. 7), followed by the district court (R. 19), in which it was held that language substantially identical with that contained in the federal sentence here in controversy permitted the incarceration of the defendant upon his release on parole from an Illinois state prison, the Seventh Circuit did not even discuss the difference in language regarded as decisive in respect of the federal sentences with which the *Wright*

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next succeeding sentence. It specifically provides that "When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated."

and *Kirk* cases were concerned, but centered its attention upon other phases of the reasoning in the *Wright* decision which are discussed in the succeeding point.

The reports show that in a number of cases involving analogous federal or state consecutive sentences, the authorities having the responsibility of enforcing the later sentence have incarcerated the prisoner under such sentence on his release from imprisonment under the earlier sentence prior to the date it technically expired without objection on the part of the authorities of the other sovereignty. *Wall* v. *Hudspeth,* 108 F. 2d 865 (C. C. A. 10); *People ex rel. Hesley* v. *Ragen,* 396 Ill. 554 (1947); *People ex rel. McCarthy* v. *Ragen,* 389 Ill. 172 (1945); *Jackson* v. *Kaiser,* 353 Mo. 919 (1945); *Wilkinson* v. *Youell,* 180 Va. 321 (1942); cf. *Zerbst* v. *McPike,* 97 F. 2d 253 (C. C. A. 5); *In re Sanford,* 10 Wash. 2d 686 (1941); see also *Kite* v. *Commonwealth,* 52 Mass. 581, 585 (1846); *In re Walsh,* 37 Neb. 454, 458 (1893). While the point here presented was not involved in these cases, they are nevertheless significant in that they show that it occurred to no one concerned that the enforcement of the later or consecutive sentence had to be delayed until the technical expiration of the earlier sentence, and are thus indicative of the artificiality of such a view

B. *Irrelevance of the question whether Missouri properly administered its parole laws in surrendering respondent to the federal authorities*

for service of the federal sentence.—The Ninth Circuit's decision in *Johnston* v. *Wright* was influenced to a considerable extent by its analysis of the Illinois parole law and the resulting conclusion that the Illinois parole agency was without authority to parole a prisoner for the purpose of subjecting him to the service of a sentence obtained in another jurisdiction (137 F. 2d at 917).

However, in its later decision in *Kirk* v. *Squier, supra,* where the language of the federal sentence was that it was to commence upon "release from imprisonment" under the state sentence, the court was not so concerned with whether California parole law supported the exercise of the power held to be lacking under the Illinois law in the *Wright* case. While it found a provision which it felt justified the action of the California parole board in surrendering the prisoner to the federal authorities, its decision was based largely on the broad ground that "In this act of paroling Kirk under the conditions noted, the State of California was administering its own parole laws. Neither Kirk nor the federal government had the legal right to interfere therewith or to shape or dictate the terms and conditions which this sovereign state might and did elect to attach to this parole. * * * Nor may Kirk by habeas corpus proceedings invoke the doctrine of comity to resist this exercise of state authority since he has violated the laws of both sovereignties. He may not,

of right, demand priority for the judgment of either." (150 F. 2d at 7–8).

And in the later case of *United States ex rel. Lombardo* v. *McDonnell,* the Seventh Circuit did not even attempt any analysis of the Illinois parole law, the same one which loomed so largely in the *Wright* case, but held directly that "While it may be true that when Lombardo was released on parole from the Illinois State Penitentiary he was theoretically a prisoner of the State, yet where a prisoner is on parole from one of two sovereigns, it is for the sovereign granting the parole, and not the prisoner, to determine priority of jurisdiction over him in connection with such parole, *United States ex rel. Demarois* v. *Farrell,* 8 Cir., 87 F. 2d 957, and the fact that he is subject to the terms of a State parole does not exempt him from being taken by the federal government where no objection is made by the paroling State, *United States* v. *Marrin,* D. C., 227 F. 314; that is to say, 'He may not, of right, demand priority for the judgment of either,'" citing the Ninth Circuit's decision in *Kirk* v. *Squier, supra* (153 F. 2d at 920–921). Cf. *Ponzi* v. *Fessenden,* 258 U. S. 254, 260; *Morse* v. *United States,* 267 U. S. 80, 82; *Rosenthal* v. *Hunter,* 164 F. 2d 949, 950 (C. C. A. 10); *Stamphill* v. *Johnston,* 136 F. 2d 291 (C. C. A. 9), certiorari denied, 320 U. S. 766; *Lunsford* v. *Hudspeth,* 126 F. 2d 653, 658, dissent-

ing opinion;[10] *Banks* v. *O'Grady*, 113 F. 2d 926, 927 (C. C. A. 8); *Wall* v. *Hudspeth*, 108 F. 2d 865, 866–867 (C. C. A. 10).

We have set out in the margin the pertinent provisions of the Missouri parole law of 1945.[11]

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[10] The majority opinion turned on a point not relevant to this discussion.

[11] Missouri Revised Statutes Annotated, 1947, Cumulative Annual Pocket Part:

"§ 8992.39 Release on parole

"The board of probation and parole is hereby authorized to release on parole any person confined in any state correctional institution, except persons under sentence of death. All paroles shall issue upon order of the board and shall be recorded. Inmates shall be considered for parole upon the application of the prisoner or upon the initiative of the board. The board shall secure and consider all pertinent information regarding each inmate, except those under sentence of death, including the circumstances of his offense, his previous social history and criminal record, his conduct, employment, attitude in the correctional institution, and reports of physical and mental examinations which have been made. Before ordering the parole of any inmate, the board shall have the inmate appear before it and shall interview him. A parole shall be ordered only for the best interest of society. A parole shall be considered a correctional treatment for any inmate and not an award of clemency. A parole shall not be considered to be a reduction of a sentence or a pardon. An inmate shall generally be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care and when the board believes that he is able and willing to fulfill the obligations of a law-abiding citizen. Every inmate while on parole shall remain in the legal custody of the institution from which he was released, but shall be amenable to the orders of the board of probation and parole. Said board shall have the power and it shall be its duty when conditions so warrant to revoke or terminate any parole, and place the offender again in the custody of the proper correctional institution. Said board

It is evident that the Missouri Board of Probation and Parole is given broad parole powers. Upon its own initiative it may release on parole any person confined in any state correctional institution, except persons under sentence of death, the parolee shall be amenable to the orders of the board while on parole, and the board "may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, * * * and conditions upon which inmates may be placed on parole." In the absence certainly of any specific provision to the contrary, the provisions recited would seem adequate to authorize the board to release a prisoner on parole for the purpose of serving a sentence rendered in another jurisdiction. Cf. *Kirk* v. *Squier, supra* (150 F. 2d at 7).

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may adopt such additional rules not inconsistent with the law as it may deem proper and necessary with respect to the eligibility of inmates for parole, the conduct of parole hearings, and conditions upon which inmates may be placed on parole. Each order for a parole issued shall contain the conditions thereof. All decisions of the board shall be by a majority vote. Laws 1945, p. 723, § 39."

"§ 8992.37 Secretary of board of probation and parole—bond

"The board of probation and parole shall appoint a secretary, who shall be the chief administrative and executive officer of the board. The secretary shall have, under the direction of the board, immediate control of presentence, and pre-parole investigations, supervision of paroles, district offices, and employed personnel of the board, and shall perform, in addition, such duties as the board may prescribe. * * * Laws 1945, p. 723, § 37."

But even if the board's power in that respect were less clear, it does not seem to us that resolution of the question here presented involves in any proper respect an appraisal of that power. The question here is, simply, whether the federal sentencing judge intended respondent's sentence to become effective when it became evident, as it later did, that the state sentence was regarded by the local authorities as no longer an obstacle to the enforcement of the federal judgment. The question is not whether the Missouri parole authorities properly administered state law in surrendering respondent to the custody of the Federal Government for service of his sentence. That, patently, is a problem purely of state concern. Concomitantly, respondent, as a violator of the laws of both sovereignties, is certainly not in a position through habeas corpus to say that comity demands that he be allowed to remain at large in Missouri until his parole period expires, and thus postpone the execution of his federal sentence. What comity demands in a particular situation is a matter for the resolution of the sovereignties concerned, not the prisoner himself. Moreover, by lessening the total term of his imprisonment respondent was, in reality, benefited, not harmed, by the action of the Missouri parole authorities.

That a state may regard its erstwhile prisoner during federal incarceration as technically a pa-

rolee until the expiration of his parole period and reserve the right to resume control of him as a parolee if he is released from federal custody during that period, is without significance. Even the Ninth Circuit itself, in its later decision in *Kirk* v. *Squier, supra,* recognizes that this constitutes no bar to the enforcement of the federal judgment, provided, of course, the appropriate operative words have been used in the federal sentence. See also *United States ex rel. Lombardo* v. *McDonnell, supra; Rosenthal* v. *Hunter,* 164 F. 2d 949 (C. C. A. 10).

CONCLUSION

The judgment of the circuit court of appeals should be reversed and that of the district court affirmed.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

T. VINCENT QUINN,
Assistant Attorney General.

W. MARVIN SMITH,
Special Assistant to the Attorney General.

ROBERT S. ERDAHL,
PHILIP R. MONAHAN,
Attorneys.

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